

## § 1.964

## 38 CFR Ch. I (7–1–09 Edition)

U.S.C. 5584: §§ 1.955(a) through (e)(2), 1.956(a) (introductory text) and (a)(3), 1.959, 1.960, 1.963a, and 1.967(c).

(b) Waiver may be granted under this section and 5 U.S.C. 5584 when collection would be against equity and good conscience and not in the best interest of the United States. Generally, these criteria will be met by a finding that the erroneous payment occurred through administrative error and that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or other person having an interest in obtaining a waiver of the claim, and waiver would not otherwise be inequitable. Generally, waiver is precluded when an employee receives a significant unexplained increase in pay or allowances, or otherwise knows, or reasonably should know, that an erroneous payment has occurred, and fails to make inquiries or bring the matter to the attention of the appropriate officials. Waiver under this standard will depend upon the facts existing in each case.

(c) An application for waiver must be received within 3 years immediately following the date on which the erroneous payment was discovered.

(Authority: 5 U.S.C. 5584; 38 U.S.C. 501).

[69 FR 62202, Oct. 25, 2004]

### § 1.964 Waiver; loan guaranty.

(a) *General.* Any indebtedness of a veteran or the indebtedness of the spouse shall be waived only when the following factors are determined to exist:

(1) Following default there was a loss of the property which constituted security for the loan guaranteed, insured or made under chapter 37 of title 38 United States Code;

(2) There is no indication of fraud, misrepresentation, or bad faith on the part of the person or persons having an interest in obtaining the waiver; and

(3) Collection of such indebtedness would be against equity and good conscience.

(b) *Spouse.* The waiver of a veteran's indebtedness shall inure to the spouse of such veteran insofar as concerns said indebtedness, unless the obligation of the spouse is specifically excepted.

However, the waiver of the indebtedness of the veteran's spouse shall not inure to the benefit of the veteran unless specifically provided for in the waiver decision.

(c) *Surviving spouse or former spouse.* A surviving spouse of a veteran or the former spouse of a veteran may be granted a waiver of the indebtedness provided the requirements of paragraph (a) of this section are met.

(d) *Preservation of Government rights.* In cases in which it is determined that waiver may be granted, the action will take such form (covenant not to sue, or otherwise) as will preserve the rights of the Government against obligors other than the veteran or the spouse.

(e) *Application.* A request for waiver of an indebtedness under this section shall be made within one year after the date on which the debtor receives, by Certified Mail-Return Receipt Requested, written notice from VA of the indebtedness. If written notice of indebtedness is sent by means other than Certified Mail-Return Receipt Requested, then there is no time limit for filing a request for waiver of indebtedness under this section.

(Authority: 38 U.S.C. 5302(b))

(f) *Exclusion.* Except as otherwise provided in this section, the indebtedness of a nonveteran obligor under the loan program is excluded from waiver.

(Authority: 38 U.S.C. 5302 (b) and (c))

[39 FR 26400, July 19, 1974, as amended at 44 FR 59907, Oct. 17, 1979; 57 FR 33875, July 31, 1992; 58 FR 3840, Jan. 12, 1993]

### § 1.965 Application of standard.

(a) The standard "Equity and Good Conscience", will be applied when the facts and circumstances in a particular case indicate a need for reasonableness and moderation in the exercise of the Government's rights. The decision reached should not be unduly favorable or adverse to either side. The phrase *equity and good conscience* means arriving at a fair decision between the obligor and the Government. In making this determination, consideration will be given to the following elements, which are not intended to be all inclusive:

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(1) *Fault of debtor.* Where actions of the debtor contribute to creation of the debt.

(2) *Balancing of faults.* Weighing fault of debtor against Department of Veterans Affairs fault.

(3) *Undue hardship.* Whether collection would deprive debtor or family of basic necessities.

(4) *Defeat the purpose.* Whether withholding of benefits or recovery would nullify the objective for which benefits were intended.

(5) *Unjust enrichment.* Failure to make restitution would result in unfair gain to the debtor.

(6) *Changing position to one's detriment.* Reliance on Department of Veterans Affairs benefits results in relinquishment of a valuable right or incurrence of a legal obligation.

(b) In applying this single standard for all areas of indebtedness, the following elements will be considered, any indication of which, if found, will preclude the granting of waiver:

(1) Fraud or misrepresentation of a material fact (see § 1.962(b)).

(2) *Bad faith.* This term generally describes unfair or deceptive dealing by one who seeks to gain thereby at another's expense. Thus, a debtor's conduct in connection with a debt arising from participation in a VA benefits/services program exhibits bad faith if such conduct, although not undertaken with actual fraudulent intent, is undertaken with intent to seek an unfair advantage, with knowledge of the likely consequences, and results in a loss to the government.

(Authority: 38 U.S.C. 5302(c))

[39 FR 26400, July 19, 1974, as amended at 58 FR 3841, Jan. 12, 1993; 58 FR 7296, Feb. 5, 1993; 69 FR 62202, Oct. 25, 2004]

### § 1.966 Scope of waiver decisions.

(a) Decisions will be based on the evidence of record. A hearing may be held at the request of the claimant or his/her representative. No expenses incurred by a claimant, his representative, or any witness incident to a hearing will be paid by the Department of Veterans Affairs.

(b) A regional office Committee may:

(1) Waive recovery as to certain persons and decline to waive as to other

persons whose claims are based on the same veteran's service.

(2) Waive or decline to waive recovery from specific benefits or sources, except that:

(i) There shall be no waiver of recovery out of insurance of an indebtedness secured thereby; i.e., an insurance overpayment to an insured. However, recovery may be waived of any or all of such indebtedness out of benefits other than insurance then or thereafter payable to the insured.

(Authority: 38 U.S.C. 501, 5302)

[39 FR 26400, July 19, 1974, as amended at 44 FR 59907, Oct. 17, 1979; 48 FR 1056, Jan. 10, 1983; 69 FR 62202, Oct. 25, 2004]

### § 1.967 Refunds.

(a) Except as provided in paragraph (c) of this section, any portion of an indebtedness resulting from participation in benefits programs administered by the Department of Veterans Affairs which has been recovered by the U.S. Government from the debtor may be considered for waiver, provided the debtor requests waiver in accordance with the time limits of § 1.963(b). If collection of an indebtedness is waived as to the debtor, such portions of the indebtedness previously collected by the Department of Veterans Affairs will be refunded. In the event that waiver of collection is granted for either an education, loan guaranty, or direct loan debt, there will be a reduction in the debtor's entitlement to future benefits in the program in which the debt originated.

(b) The Department of Veterans Affairs may not waive collection of the indebtedness of an educational institution found liable under 38 U.S.C. 3685. Waiver of collection of educational benefit overpayments from all or a portion of the eligible persons attending an educational institution which has been found liable under 38 U.S.C. 3685 shall not relieve the institution of its assessed liability. (See 38 CFR 21.4009(f)).

(c) The regulatory provisions concerning refunds of indebtedness collected by the Department of Veterans